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Supreme Court of the United States

October Term, 1965

No. 1047

EDWARD GOLDSTEIN,

Petitioner,

against

MAX DOFT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

October Term, 1965

No.

EDWARD GOLDSTEIN,

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against

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is reported at 353 F. 2d 484. The opinion of the United States District Court for the Southern District of New York, Edward Weinfeld, J. is reported at 236 F. Supp. 730.

Jurisdiction of This Court

The jurisdiction of this Court is invoked under Title 28 U. S. C. 1254(1).

The judgment of the United States Court of Appeals for the Second Circuit was entered on November 22, 1965.

Questions Presented

1. Does an award by an arbitration board come within the concept of substantive law, as enunciated in the case of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, so as to make the holding in *Riverdale Fabrics Corp.*, 306 N. Y. 288, 118 N. E. 2d 104 controlling, or is it within the judicial power of a federal court to disregard such holding and enunciate its own concept as to the force and effect of an award by an arbitration board, in conflict with the law as laid down by the Court of Appeals of the State of New York.

2. In considering due process of law, has a citizen the absolute right to resort to the courts to enforce claims not presented to or passed upon by an arbitration board, as held by the Court of Appeals of the State of New York, in the case of *Riverdale, supra*, or is he barred from doing so by an adverse arbitration award against him involving collateral matter, as held by the court below.

Reasons for Granting the Writ

There is no legal basis for a federal court to establish principles of law as to substantive state rights particularly in conflict therewith.

The Court below rendered a decision in direct conflict with and overruling the controlling law of the case, which is expressed in the case of *Riverdale Fabrics Corp.*, 306 N. Y. 288, 118 N. E. 2d 104 as follows (p. 289):

> "[1, 2] There is a substantial distinction between this contract and the one which was involved in the Level case.* The rule is that a party is not to be compelled to surrender his right to resort to the

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* *Level Export Corp.* (*Wolz, Aiken & Co.*), 280 App. Div. 211, 112 N. Y. S. 2d 549.

courts, with all of their safeguards, unless he has agreed in writing to do so, Matter of Philip Export Corp. (Leathertone, Inc.), 275 App. Div. 102, 104, 87 N. Y. S. 2d 665, 666, and by clear language, Lehman v. Ostrovsky, 264 N. Y. 130, 132, 190 N. E. 208, 209. Although one may by contract bargain away his right to resort to the courts in matters which might be the subject of a civil action, Civil Practice Act, § 1448, 'the agreement to do so will not be extended by construction or implication.' Western Assur. Co. v. Decker, 8 Cir., 98 F. 381, 382." (Asterisk ours.)

The Court below enunciated a principle of law which constitutes a radical departure from well established law and an assumption of jurisdiction which it does not possess.

The function of arbitration boards throughout the United States constitute a vital integral part of our American jurisprudence, and the force and power of its awards can be a great constructive or destructive powers of fundamental constitutional rights of American citizens.

Facts of the Case

Petitioner instituted arbitration proceedings on August 7, 1959 against Princeton Knitting Mills, Inc., for commissions due as a salesman * (7a).

The issue in the arbitration matter was:

> "Claim or Relief Sought: (amount if any) Payment of commissions due—in an amount presently undetermined" (7a).

Respondent, Max Doft, was a partner of Princeton Knitting Sales Co. (7a).

The Arbitration Board disallowed said claim for commissions, which disallowance was affirmed by the New York Supreme Court (8a).

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* Folios refer to appellant's appendix in Court of Appeals.

Petitioner filed an action in the United States District Court for the Southern District of New York claiming:

1. Fraud, deceit and misrepresentations in

(a) inducing petitioner to reduce commissions.

(b) warranting to petitioner that petitioner would be appointed sales agent for a new shoe trade line of merchandise.

2. Wrongfully causing accounts to be taken from petitioner.

3. Conspiracy to conceal petitioner's accounts in order to deprive petitioner of commissions.

4. Depriving petitioner of the fruits of his labors in introducing a new line to the shoe trade.

5. Respondent's wrongful interference with petitioner's contract of employment.

6. Respondent's unjust enrichment together with a claim for punitive damages.

None of the above claims were before the Arbitration Board.

Statements of personal tort and breach of contract as to unrelated matters does not vest the arbitration board with authority to go beyond the controversy submitted to said board for arbitration, which in the instant case was commissions due petitioner from Princeton Knitting Mills, Inc., and Princeton Knitting Sales Co. (7a).

Respondent introduced the aforesaid arbitration award as res judicata, claiming he was personally before the arbitration tribunal.

Petitioner moved to strike the defense of res judicata which was denied by Levet, J. holding that "Before trial

it is not possible to tell the application of the defense raised."

(Opinion of Levet, J. is reprinted in full as part of the appendix to this petition at page 12.)

At the time this cause was called for trial, and before actually opening the trial, the trial judge, after argument, held the defense good and dismissed.

The Court below affirmed the Trial Court's decision.

POINT I

The force and effect of an arbitration award has been erroneously adjudicated to the extent that awards by arbitration boards throughout the country may become a force of injustice and undue limitation and denial of fundamental and constitutional rights of citizens.

An arbitration award, when incorrectly interpreted, may be used as a subtle, artful or devious means and as a trap for the unwary. It is to avoid such misuse of arbitration that the New York Courts have repeatedly stated that:

> "Controversies which the parties have not agreed to arbitrate are to be submitted to and disposed of by the established judicial tribunals" (*Eagar Construction Corporation* v. *Ward Foundation Corporation*, 255 App. Div. 291, 7 N. Y. S. 2d 450, 453).

The decision by the Court below is in conflict with the well established and uniform holdings as to the law laid down by the Court of Appeals of the State of New York.

> *Lehman* v. *Ostrovsky*, 264 N. Y. 130, 190 N. E. 208; *Eagar Construction Corporation* v. *Ward Foundation Corporation, supra.*

POINT II

The court below was in error in denying to a citizen fundamental constitutional rights, recognized within the concept of state law by the Court of Appeals of the State of New York.

The question as to whether or not petitioner's complaint alleged facts outside of the scope of matters legally and properly before an arbitration board presented a jury question, as held by Judge Levet, and it was error for the Trial Court to overrule Judge Levet and hold that there were no questions of fact to be submitted to a jury.

The erroneous disregard of the controlling law as laid down by the Court of Appeals of the State of New York in *Riverdale, supra,* is exemplified by the fact that the Trial Court did not render any decision as to whether or not respondent was guilty of having committed personal torts and having breached collateral contracts, completely divorced and separate and apart from the contract which was the sole subject matter before the Arbitration Board.

POINT III

The court below erroneously enunciated a principle of law in conflict with the holding in the case of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817.

Arbitration boards are within the exclusive jurisdiction of state law.

An award by an arbitration board cannot possibly be a basis for denying due process of law.

The factual issues presented by the petitioner were based on fundamental constitutional rights, that is:

(a) compensation for work, labor and services rendered under a personal contract between petitioner and respond-

ent, Max Doft, unrelated in anywise to the subject matter before the Arbitration Board.

(b) a personal tort by Max Doft against petitioner, based on fraud, deceit and misrepresentation.

The matter before the Arbitration Board was "Claim or Relief Sought: (amount if any) Payment of Commissions due—in an amount presently undetermined" (7a).

Petitioner's resort to the federal court was predicated upon work, labor and services done exclusively, pursuant to a contract with Max Doft in the shoe trade, and not for commissions for work done for the Princeton Knitting Mills, Inc. or the Princeton Knitting Sales Co.

Whether or not the complaint came within the law as laid down by the Court of Appeals of the State of New York in *Riverdale, supra,* constituted factual matters clearly the province of a jury's determination.

No Judge has a right to take from a jury unto himself the decision of controverted questions of fact.

In the case of *Lavender* v. *Kurn,* 327 U. S. 645, 66 S. Ct. 740, this Court stated at page 744:

> "Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury. See Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 67, 68, 63 S. Ct. 444, 451, 87 L. Ed. 610, 143 A. L. R. 967; Bailey v. Central Vermont R.R. Co., 319 U. S. 350, 353, 354, 63 S. Ct. 1062, 1064, 87 L. Ed. 1444; Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29, 35, 64 S. Ct. 409, 412, 88 L. Ed. 520. See also Moore, 'Recent Trends in Judicial Interpretation in Railroad Cases Under the Federal Employers' Liability Act,' 29 Marquette L Rev. 73."

CONCLUSION

The fundamental and constitutional rights of American citizens are in jeopardy if an award by an arbitration board can be given the effect of a bar to a just claim without the scope of the controversy before the Board and beyond its jurisdiction, and in conflict with well established and uniform law as laid down by the Court of Appeals of the State of New York.

Respectfully submitted,

JACOB RASSNER,
Attorney for Petitioner.

(APPENDIX)

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 99—September Term, 1965.

(Argued October 27, 1965 Decided November 22, 1965.)

Docket No. 29552

EDWARD GOLDSTEIN,

Plaintiff-Appellant,

against

MAX DOFT,

Defendant-Appellee.

Before:

LUMBARD, *Chief Judge,*
MEDINA and SMITH, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Southern District of New York, Edward Weinfeld, *Judge.*

Edward Goldstein appeals from a judgment sustaining the defense of *res judicata* and dismissing his complaint. Opinion below 236 F. Supp. 730. Affirmed.

JACOB RASSNER, New York, N. Y. (Leonard H. Wallach, Atlantic City, N. J., on the brief), *for plaintiff-appellant.*

SAMUEL B. SEIDEL, New York, N. Y. (Kurzman & Frank, New York, N. Y., on the brief), *for defendant-appellee.*

Opinion of Court of Appeals

PER CURIAM:

We affirm on Judge Weinfeld's opinion below, reported at 236 F. Supp. 730. While Judge Weinfeld's opinion makes no specific reference to the allegations that appellant was deprived "of the fruits of his labors in introducing a new line to the shoe trade," it is clear from the context that this item was not overlooked. As with appellant's other claims on the merits, the difference between the issues litigated before the arbitrators and those attempted to be presented in this subsequent litigation is one of semantics only. The introduction of "a new line to the shoe trade" turns out to refer not to shoes but to "fabrics for the shoe trade" and thus is in the category of the goods appellant was to sell under his contract of February 26, 1948. Appellant was afforded the fullest opportunity to present his proofs to the arbitrators and he did so. Arbitration would be of little value if the entire controversy or any part thereof could be reopened later by a mere change in the words or phrases used to characterize the matters included in the claim the arbitrators had rejected.

Affirmed.

Judgment of Affirmance of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-second day of November, one thousand nine hundred and sixty-five.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. HAROLD R. MEDINA,
HON. J. JOSEPH SMITH,
Circuit Judges.

EDWARD GOLDSTEIN,
Plaintiff-Appellant,

v.

MAX DOFT,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to the appellee.

A. DANIEL FUSARO,
Clerk.

Opinion of Levet, *D.J.*, Denying Petitioner's Motion to Strike Affirmative Defense of *Res Judicata*

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The motion of plaintiff under Rule 12(f) of the Federal Rules of Civil Procedure to strike defendant's first affirmative defense of res judicata is denied.

In the arbitration proceeding referred to, defendant Doft was one of the members of the partnership known as Princeton Knitting Sales Co., a party to said arbitration proceeding.

This court cannot determine that the defense of res judicata is not available to some extent at least. See *Israel* v. *Wood Dolson Co.*, 1 N. Y. 2d 116; *Good Health Dairy Products Corp.* v. *Emery*, 275 N. Y. 14.

Before trial it is not possible to tell the application of the defense raised. To strike the defense at this juncture is unwarranted.

Motion denied.
So ordered.

Dated: New York, N. Y.
January 30, 1963

RICHARD H. LEVET,
U. S. D. J.

Opinion of Edward Weinfeld, *D.J.*, Sustaining Defense of *Res Judicata* and Dismissing Complaint

Upon assignment of this case for trial, the defendant renewed his motion for judgment based upon the defense of res judicata, and plaintiff likewise renewed his motion to strike the defense. Judge Cashin, in denying the defendant's motion, granted his alternative one to require plaintiff to set forth a more definite statement of his claim in order to permit adequate consideration of the res judicata plea.[1] Following service of plaintiff's amended pleading, Judge Levet denied his motion to strike the defense. These prior decisions do not preclude consideration of the renewed motions made by the parties, for the Court did not then have the benefit of the full articulation of plaintiff's claim, and Judge Levet had only plaintiff's motion before him. Moreover, even an adverse ruling on defendant's motion prior to trial does not bar redetermination of the issue by this Court.[2] Consideration of the renewed applications is desirable since if the defense is valid it would obviate a long and expensive trial.

On February 28, 1948, the plaintiff, a citizen of Massachusetts, doing business as Fabtex Sales Associates, entered into a letter agreement with Princeton Knitting Sales Company, a New York partnership and sales agent for Princeton Knitting Mills, Inc., a New York corporation, whereby plaintiff was to receive two per cent commission "on the net amount of all orders procured by [him]." The contract provided that plaintiff was not entitled to "any

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[1] Defendant was forced to move to strike the first amended complaint for failure to comply with Judge Cashin's order. Judge Palmieri stayed all pretrial proceedings by plaintiff pending compliance, following which a second amended complaint was served.

[2] Dictograph Prods. Co. v. Sonotone Corp., 230 F. 2d 131, 134-36 (2d Cir. 1956). See also, Commerce Oil Ref. Corp. v. Miner, 303 F. 2d 125, 128 (1st Cir. 1963). But cf. TCF Film Corp. v. Gourley, 240 F. 2d 711, 713 (3d Cir. 1957).

other compensation by way of commissions or otherwise from us or from any principal represented by us." Each party retained the right to terminate the relationship upon notice, and "any question or controversy arising out of or in connection with this agreement shall be finally determined by arbitration. . . ." This contractual relationship continued subject to a number of oral modifications until it was terminated in December 1958.

On August 7, 1959 the plaintiff invoked the arbitration provision by initiating a proceeding before the American Arbitration Association "for payment of commissions due —in an amount presently undetermined," making his demand for arbitration upon "Princeton Knitting Sales Co., as agent for Princeton Knitting Mills, Inc., and Princeton Knitting Mills."[3] Thereafter on September 28, 1959 plaintiff, in support of his claim, filed a detailed statement which included charges of fraud and misrepresentation by Max Doft, a partner in Princeton Knitting Sales Company and also an officer, director and shareholder of Princeton Knitting Mills, Inc. Plaintiff asserted that by reason of such fraud he had, with respect to enumerated accounts, waived or reduced the commission payable under the agreement. The parties were represented by counsel at the hearings, which extended over a period of time, after which the arbitrators made the following award:

> "The claims by Edward Goldstein, hereinafter referred to as Goldstein, against Princeton Knitting Sales Co., as agent for Princeton Knitting Mills, Inc. and Princeton Knitting Mills, hereinafter jointly and individually referred to as Princeton are disallowed."

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[3] There is no such entity as "Princeton Knitting Mills." The corporate designation "Inc." appears to have been omitted and the title of all subsequent proceedings was carried forward in the same manner.

Opinion of Edward Weinfeld, D. J., Sustaining Defense of Res Judicata and Dismissing Complaint

The plaintiff's attack upon the award was rejected and it was confirmed by the Supreme Court, New York County.

Plaintiff thereafter commenced this diversity action, naming as the sole defendant, Max Doft. He repeats the contentions which he had unsuccessfully advanced in the arbitration proceeding—that he was entitled to commissions even on sales in which he had played no part, and that he had been deprived of commissions rightfully due him by misrepresentations and acts of concealment—and asserts three causes of action against Doft. Plaintiff alleges it was Doft who made the misrepresentations to him, that he "willfully, wrongfully and maliciously caused . . . plaintiff's discharge . . . and the termination . . . of plaintiff's said contract," and that Doft, in his capacity as a partner in Princeton Knitting Sales Company, and as an officer, director and shareholder of the corporation, has been unjustly enriched by reason of the foregoing.

Upon examination of the plaintiff's amended complaint, the entire file in the arbitration proceeding, including "the demand for arbitration" dated August 7, 1959, the claim of plaintiff dated September 28, 1959, the award of arbitration dated January 5, 1961, the opinion of Mr. Justice Hecht of the Supreme Court of the State of New York, New York County, dated May 1, 1961, the order entered thereon dated May 9, 1961, and the briefs submitted by counsel representing the respective parties to the arbitrators, the conclusion is compelled that the plaintiff's claims, however worded, are barred on the principle of res judicata, and that his complaint must be dismissed.

Plaintiff's principal claim—that he was entitled to commissions on all sales from his territory, and that he was deprived of commissions by misrepresentations and concealment—was squarely presented to the arbitrators, who ruled adversely to him. This may not be relitigated. The very accounts specified in plaintiff's amended complaint herein are those enumerated in his arbitration claim.

Opinion of Edward Weinfeld, D. J., Sustaining Defense of Res Judicata and Dismissing Complaint

The remaining claims—the alleged inducements of a breach of contract and unjust enrichment—must likewise fall in view of the holding by the arbitrators that no sum was due to plaintiff, which forecloses any claim that there was a breach of the agreement or that fraudulent conduct by Doft deprived plaintiff of any commissions due him thereunder.

Before plaintiff can succeed on either of the latter claims, he would have to establish as an essential element a breach of the agreement under which he was to receive his commissions. Since the award went against him on this issue, he may not now relitigate it.[4] Moreover, since those claims are directly related to the contract and within its broad arbitration provision, they might have been brought before the arbitrators,[5] and also are barred. New York law, which is made applicable to this contract by express provision therein, provides "that an existing final judgment rendered upon the merits by a court of competent jurisdiction, is binding upon the parties and their privies in all other actions or suits on points and matters litigated and adjudicated in the first suit or which might have been litigated therein. . . ."[6]

Apart from the fact that the principle of res judicata bars recovery, it is questionable that any cause of action

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[4] Israel v. Wood Dolson Co., 1 N. Y. 2d 116, 120, 151 N. Y. S. 2d 1, 5 (1956); American Button Co. v. Warsaw Button Co., 31 N. Y. S. 2d 395, 397 (Sup. Ct. 1941), aff'd mem. 265 App. Div. 905, 38 N. Y. S. 2d 570 (4th Dep't 1942).

[5] See Exercycle Corp. v. Maratta, 9 N. Y. 2d 329, 334, 214 N. Y. S. 2d 353, 355 (1961); Fabrex Corp. v. Winard Sales Co., 200 N. Y. S. 2d 278 (Sup. Ct. 1960).

[6] Israel v. Wood Dolson Co., 1 N. Y. 2d 116, 118, 151 N. Y. S. 2d 1, 3 (1956); Good Health Dairy Prods. Corp. v. Emery, 275 N. Y. 14, 17 (1937); Schuykill Fuel Corp. v. B. & C. Nieberg Realty Corp., 250 N. Y. 304, 306-07 (1929).

may be aseerted against an obligor under an agreement for inducing a breach thereof.[7] Defendant here was not a stranger to the agreement but was bound by it as a member of the partnership. Another obstacle to plaintiff's suit is that "since the [contract was] terminable at will, the discontinuance of the plaintiff's services, however induced, could not constitute a breach of contract."[8]

Plaintiff seeks to escape the consequences of the unfavorable arbitration award by a number of expedients, none of which is persuasive. First, he stresses that this action names Max Doft individually, rather than the partnership and its corporate principal; further, he contends that in the arbitration proceeding the real and only party in interest was the corporation, not Doft or his partnership, and consequently that since he individually was not a party thereto, the principle of res judicata does not apply. This contention, apart from its legal insufficiency, flies in the face of the facts. The provision which plaintiff relied upon to invoke the arbitration was contained in the agreement dated February 26, 1948 between him and the Princeton Knitting Sales Company, of which defendant was and is a partner. The claim submitted by plaintiff to arbitration specifically referred to that agreement, which expressly provided that the partnership, but not the corporation, would be liable for commissions.[9] Finally, and significantly, the plaintiff himself, in opposing confirmation of the award before the Supreme Court of the State of New York, acknowledged that:

> ". . . [I]t was agreed between the parties and counsel that Princeton Knitting Mills, Inc., and

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[7] See, e.g., Cuker Indus., Inc. v. William L. Crow Constr. Co., 6 App. Div. 2d 415, 178 N. Y. S. 2d 777 (1st Dep't 1958).

[8] Terry v. Dairymen's League Co-operative Ass'n, 2 App. Div. 2d 494, 157 N. Y. S. 2d 71, 76 (3d Dep't 1956).

[9] See Application of Clyde Fashions, Ltd., 15 App. Div. 2d 482, 222 N. Y. S. 2d 545 (1st Dep't 1961).

Princeton Knitting Sales Co., were to be considered as one entity." [10]

Moreover, assuming arguendo, as plaintiff contends, that Doft or the partnership was only an agent of the corporation and was not in fact a party to the arbitration proceeding, the plaintiff would still be bound by the adverse determination of the arbitrators on his claims since he had "been given a full opportunity to litigate those issues against one of the parties. . . ." [11]

In appropriate circumstances, New York law affords a defendant the benefit of a former adjudication adverse to a plaintiff even though the defendant had not been a party to the litigation. Thus, the principle of res judicata has been applied where a plaintiff brought an action against the owner of a car after failing to fasten liability upon its driver,[12] where a broker first failed to recover against a seller for breach of contract and then attempted to sue the buyer for inducing the breach,[13] and where shareholders brought suit in New York against the directors of a corporation after failing in a Delaware suit brought against the corporation to set aside the sale of corporate assets.[14]

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[10] Edward Goldstein petition in support of motion to vacate arbitration award, p. 3.

[11] Israel v. Wood Dolson Co., 1 N. Y. 2d 116, 119, 151 N. Y. S. 2d 1, 4 (1956).

[12] Good Health Dairy Prods. Corp. v. Emery, 275 N. Y. 14 (1937).

[13] Israel v. Wood Dolson Co., 1 N. Y. 2d 116, 151 N. Y. S. 2d 1 (1956); American Button Co. v. Warsaw Button Co., 31 N. Y. S. 2d 395 (Sup. Ct. 1941), aff'd nom., 265 App. Div. 905, 38 N. Y. S. 2d 570 (4th Dep't 1942).

[14] Cohen v. Dana, 83 N. Y. S. 2d 414 (Sup. Ct. 1948), aff'd mem. 275 App. Div. 733, 87 N. Y. S. 2d 614 (2d Dep't), aff'd mem., 300 N. Y. 608 (1949).

The latter two categories are strikingly apposite to the case before the Court.

The next expedient focuses upon the difference in the theories upon which relief is sought in this action and those pursued in the arbitration proceeding. Plaintiff contends he there sought only "commissions due," while here he seeks damages for misrepresentation, inducement of breach of contract and unjust enrichment—that his present complaint sounds in tort. But a shift in legal theories or a new or different ground for relief sought does not of itself work magic and dissolve the defense of res judicata. In this instance, too, plaintiff ignores fact. He expressly sought to support his claim for "commissions due" by charges of fraud and misrepresentation. He now argues that presentation of these charges to the arbitrators "constituted surplusage and was outside the scope of the issues before the administrative tribunal."[15] However, having himself framed the issues, he cannot now avoid them. The wholesome principle of res judicata is not to be overcome so easily. In any event, as this Court has previously written, a plaintiff cannot "escape the effect of the adverse determination by clothing the claim in a different garb. . . ."[16]

This is also the New York rule. In Cohen v. Dana,[17] shareholders brought a derivative suit against their corporation's directors, alleging fraud and violations of fiduciary duty. During the pendency of the suit, the plaintiffs sued the corporation in Delaware, requesting appointment of a receiver with power to set aside an allegedly fraudulent sale of corporate assets. Upon denial of the relief sought in Delaware, the New York court granted summary judg-

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[15] Plaintiff's memorandum re res judicata defense, p. 3.

[16] Frost v. Bankers Commercial Corp., 11 F. R. D. 195 (S. D. N. Y. 1951), aff'd, 194 F. 2d 505 (2d Cir. 1952).

[17] 83 N. Y. S. 2d 414 (Sup. Ct. 1948), aff'd mem., 275 App. Div. 723, 87 N. Y. S. 2d 614 (2d Dep't), aff'd mem., 300 N. Y. 608 (1949).

ment to the defendant directors, nothing that "in their attempt to prove the Delaware complaint the plaintiffs had to adduce the same type and scope of evidence they would have to submit to prove the New York complaint." [18] That the relief sought differed in the two actions was expressly held not to prevent application of the former adjudication bar.

To permit this suit to be maintained in the face of the incontrovertible facts would make a shambles of the doctrine of res judicata—intended not only for the protection of litigants, but also in the interest of the State—indeed, it would give the plaintiff "two bites of the cherry." [19]

The defense is sustained and the defendant is entitled to judgment dismissing the complaint.

Dated: New York, N. Y.
December 29, 1964

EDWARD WEINFELD,
United States District Judge

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[18] Cohen v. Dana, 83 N. Y. S. 2d at 419. Accord, Israel v. Wood Dolson Co., 1 N. Y. 2d 116, 120, 151 N. Y. S. 2d 1, 5 (1956).

[19] Cohen v. Dana, 83 N. Y. S. 2d at 418.